90

(2)

No. 07-1200

FILED
APR 21 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS P. NIXON,

Petitioner,

v.

CITY OF HOUSTON AND HAROLD HURTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

DAVID M. FELDMAN
Counsel of Record
FELDMAN, ROGERS, MORRIS & GROVER, LLP
578 WESTHEIMER, SUITE 1200
HOUSTON, TEXAS 77057
(713) 960-6000

Attorney for Respondents

April 21, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Whether the Fifth Circuit correctly applied the *Pickering* balancing test when considering a municipality's interest in providing effective and efficient police services.

II. Whether Petitioner fails to show a true conflict among the various circuit courts' application of *Garcetti v. Ceballos*, 547 U.S. 410 (2006) worthy of this Court's review, especially where any conflict would be immaterial to the outcome of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Factual Background 1

1. "The Insider" Articles 1

2. Petitioner's January 2006 Media Statements 2

II. Procedural Background 5

REASONS FOR DENYING THE PETITION 6

I. The Fifth Circuit's Ruling In This Case Does Not Require A "Clarification" To The *Pickering* Balancing Test 6

1. A government employer need not produce evidence of actual harm or disruption to governmental operations 7

2. Law enforcement agencies have a substantial interest in maintaining the mission and professionalism of its officers 10

II. Petitioner Has Not Identified A Conflict In The Various Circuit Courts' Application of *Garcetti* 12

1. The Fifth Circuit's decision does not conflict with the other courts of appeal 13

2. The Fifth Circuit correctly found that Petitioner's media interviews were made pursuant to his official duties 15

3. Granting the Petition would serve no practical purpose, since the *Pickering* balancing tests provides a separate and independent basis for dismissal of Petitioner's lawsuit 17

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Battle v. Bd. of Regents,
468 F.3d 755 (11th Cir. 2006) 14

Berger v. Battaglia,
779 F.2d 992 (4th Cir. 1985) 11

Casey v. West Las Vegas Indep. Sch. Dist.,
473 F.3d 1323 (10th Cir. 2007) 14, 15

City of San Diego v. Roe,
543 U.S. 77, 125 S. Ct. 521 (2004) 11

Connick v. Myers,
461 U.S. 138, 103 S. Ct. 1684 (1983) 7, 8

Dibble v. City of Chandler,
515 F.3d 918 (9th Cir. 2008) 11, 12

Flanagan v. Munger,
890 F.2d 1557 (10th Cir. 1989) 11

Freitag v. Ayers,
468 F.3d 528 (9th Cir. 2006) 14, 15

Garcetti v. Ceballos
547 U.S. 410, 126 S. Ct. 1951 (2006) .... *passim*

Green v. Board of County Commissioners,
472 F.3d 794 (10th Cir. 2007) 14

Kinney v. Weaver,
367 F.3d 337 (5th Cir. 2004) 9

Kokkinis v. Ivkovich,
185 F.3d 840 (7th Cir. 1999) 9

Mills v. City of Evansville,
452 F.3d 646 (7th Cir. 2006) 14

Moore v. City of Wynnewood,
57 F.3d 924 (10th Cir. 1995) 9

Thaeter Palm Beach County Sheriff's Office,
449 F.3d 1342 (11th Cir. 2006) 12

Tindle v. Caudell,
56 F.3d 966 (8th Cir. 1995) 9

Tyler v. City of Mountain Home,
72 F.3d 568 (8th Cir. 1995) 9

Waters v. Churchill,
511 U.S. 661, 114 S.Ct. 1478 (1994) 7

Williams v. Dallas Indep. Sch. Dist.,
480 F.3d 689 (5th Cir. 2007) 13, 14

STATEMENT OF THE CASE

Petitioner is a former patrol officer with the City of Houston Police Department ("HPD") and a licensed practicing attorney.[1] Petitioner claims that his 15-day temporary suspension (for certain articles he published) and his later termination from HPD (for certain statements he made to the media) constitute employment retaliation in violation of his First Amendment right to free speech. Both the District Court and the Fifth Circuit found that Petitioner's speech was not protected by the First Amendment.

I. Factual Background.

1. "The Insider" Articles.

Between May 2004 and May 2006, Petitioner wrote a monthly column entitled "The Insider" in 002 Magazine, a local Houston periodical. In the articles, Petitioner identified himself as an HPD police officer and discussed his police-related experiences, his job duties, and HPD policies. The method and manner in which Petitioner expressed his views in many of the articles were offensive, insensitive, and disrespectful to the particular citizens and groups that Petitioner encountered on his patrol. For example, in his articles, Petitioner characterized inner-city residents as "rats," single women with cats as mentally unstable, homeless people as "criminals," and children with problems as "freaks."

---

[1] Petitioner went to law school and was admitted to the State Bar of Texas (2005) while employed as an HPD officer.

HPD initiated an investigation of the articles through its Internal Affairs Division after receiving a citizen's complaint about one of the articles. In the complaint, the citizen questioned whether HPD shared and/or condoned the views expressed in the article and whether Petitioner could properly fulfill the duties of an HPD officer. The HPD investigation determined that Petitioner's writing and publishing of the articles violated numerous HPD policies and undermined the efficiency of the services provided by HPD. As a result, HPD suspended Petitioner without pay for fifteen days.

2. Petitioner's January 2006 Media Statements.

On January 18, 2006, a lengthy motor vehicle pursuit involving local and state law enforcement officers and a fleeing suspect took place on the streets of Houston. After the suspect had been identified, HPD supervisors involved in the chase ordered all police officers to discontinue hot pursuit of the suspect. Nonetheless, approximately 30 minutes after discontinuing hot pursuit, the suspect's vehicle collided with an innocent motorist.[2]

Petitioner was not one of the HPD officers involved in the chase, and was never directed by HPD to go to the accident scene where the chase terminated. Instead, Petitioner learned about the pursuit by watching it on television while preparing for his shift. When his shift began, Petitioner unilaterally decided

---

[2] The chase and accident was carried live by most local television stations.

to drive his patrol car to the crash site. While at the accident scene, Petitioner asked a supervisor if anyone was going to make a statement to the media, and suggested that he (Petitioner) do so. Thinking that Petitioner was joking, the supervisor laughed and did not otherwise respond to Petitioner's question. Nevertheless, despite his lack of involvement in and information about the chase, Petitioner decided to speak to the media.

In his statement to the media, Petitioner criticized HPD's decision to disengage the pursuit and stated that he was "embarrassed to be a police officer" because the department did not stop fleeing suspects. The next day, Petitioner continued his criticism of HPD and its pursuit policy by voluntarily calling into multiple radio talk shows and by giving television interviews. In one interview, Petitioner admitted that he had previously violated HPD's pursuit policy and that he was glad he had violated it. On another radio talk program, Petitioner responded to a question about a possible "dissension in the ranks" at HPD by stating, "I wouldn't call it dissension. I think I would call it a degree of disgust because we are out there trying to do a job."[3] Petitioner also agreed on that radio program that he felt "comfortable" violating a direct order given him by a supervisor because he has "civil service protection as a police officer," which he never

---

[3] Petitioner's use of the term "we" implied that he spoke on behalf of other HPD officers.

"enjoyed" in the Army.[4] On both January 18 and 19, 2006, after finishing his remarks, Petitioner called HPD media relations office to inform the office that he had spoken to the media, presumably in an attempt to comply with HPD's media policy.[5]

An HPD Internal Affairs investigation of Petitioner's media statements determined that Petitioner had violated numerous policies and general orders. HPD also concluded that Petitioner's public comments would cause problems in maintaining discipline and order among officers, the harmony and

---

[4] On February 21 and 22, 2006, the district court held a preliminary injunction hearing in connection with Petitioner's lawsuit. The hearing was held prior to the conclusion of HPD's investigation into Petitioner's media statements. During the hearing, Petitioner testified that he had, in the past, deliberately disobeyed the pursuit policy, which he considered to be a lawful order, and stated his belief that officers should be permitted to make judgment calls as to whether to violate an existing policy. Further, Petitioner admitted that he would use deadly force to end a pursuit, which he knew was a violation of existing HPD policy, if he believed it would prevent innocent people from being injured. Petitioner also professed that it was "absolutely" the role of a police officer to make an admission of liability on the City's part if it created a public discourse on what the officer believed was a matter of public concern.

[5] HPD's Media Relations policy states: "In emergency or scene related situations, officers will provide the media with information regarding the scene or event in a timely manner. The Media Relations office will be notified of this release of information as soon as possible after the information has been released. Examples of this type of activity include shootings, robberies, accidents, disaster, etc."

close working relationships between supervisor and officers, the public confidence in the integrity and competency of HPD, and the supervisory confidence in the ability of Petitioner to effectively perform his duties as a patrol officer. Thus, Petitioner's employment was terminated.[6]

II. Procedural Background.

Petitioner filed his Original Complaint and Application for Temporary Restraining Order and Preliminary Injunction on January 27, 2006, seeking money damages and injunctive relief for alleged employment retaliation by HPD against him. Following a preliminary injunction hearing held on February 21-22, 2006, United States District Judge David Hittner denied Petitioner's request for a preliminary injunction on March 3, 2006. On or about October 27, 2006, HPD filed their Motion for Summary Judgment. On January 25, 2007, Judge Hittner granted summary judgment in HPD's favor and signed

---

[6] Pursuant to his rights as a civil service employee, Petitioner appealed to the Police Officers' Civil Service Commission (the "Commission") both his 15-day temporary suspension for authoring the *002 Magazine* articles and his termination for his January 18 and 19, 2006 media statements. Petitioner was represented by counsel at the hearings, had the opportunity to call witnesses in his defense, and cross-examined HPD's witnesses. Ultimately, the three-member Commission panel assigned to hear the appeals unanimously upheld both Petitioner's 15-day suspension and his termination, with both panels specifically finding that the charges contained in the suspension and termination letters were true and correct and represented a sufficient basis or just cause for the disciplinary actions.

a Final Judgment dismissing Petitioner's claims. Petitioner filed his Notice of Appeal on or about February 22, 2007. The Fifth Circuit affirmed. In sum, the Court determined that Petitioner's January 2006 media statements, for which he was terminated, were made pursuant to his official job duties and that the Constitution did not insulate such speech from his employer's discipline. The Court also found that even if Petitioner's media statements and earlier articles (for which he was temporarily suspended) constituted citizen speech addressing matters of public concern, the speech was unprotected by the First Amendment under *Pickering*.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Ruling In This Case Does Not Require A "Clarification" To The *Pickering* Balancing Test.

Petitioner takes issue with the Fifth Circuit's conclusion that his interest in commenting upon matters of public concern were outweighed, in this case, by HPD's substantial interests in the efficient provision of law enforcement services. Rather than point to any error of law in the Court's *Pickering* analysis, Petitioner argues that the *Pickering* balancing test should be "clarified" to require governmental entities to show that an employee's speech caused *actual* harm to the effective and efficient operations of the entity. Further, Petitioner argues that no weight should be given to the efficacy and efficiency of police department functions arising from public perceptions of the inappropriate activities of police officers. Neither of Petitioner's arguments are

availing as both have already been rejected by this Court.

1. A government employer need not produce evidence of actual harm or disruption to governmental operations.

The "actual harm" standard urged by Petitioner is analogous to the standard previously rejected by this Court in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). In *Connick*, an assistant district attorney was terminated after she circulated to her co-workers a questionnaire concerning, among other things, whether the employees felt pressure to work in political campaigns. The district court, in finding for the employee, held that the questionnaire involved matters of public concern and that the employer had not "*clearly demonstrated*" that the survey "*substantially interfered*" with the operations of the District Attorney's office. On review, this Court held that the district court erred in imposing "an unduly onerous burden" on the state to justify the employee's discharge. *Connick*, 467 U.S. at 149-50. As explained in *Connick*, the employer's burden in justifying a particular discharge varies depending on the nature of the employee's expression and requires "a full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150. Moreover, prolonging the retention of a disruptive employee until the harm has become manifest and caused an actual impairment to the efficiency of the public services provided is neither necessary nor advisable. *Id.* at 151-52; *see also Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878 (1994). Indeed, as noted in *Waters*, this Court has consistently

given substantial weight "to government employer's *reasonable predictions of disruption*, even when the speech involved is on a matter of public concern." 511 U.S. at 673 (emphasis added).

The Court's admonition in *Connick* that disruption of the office and destruction of working relationships need not be manifest before taking action is especially applicable in the context of law enforcement, where there exists, by the very nature of the services provided, an overriding interest in maintaining discipline, efficiency, and effectiveness in protecting the public safety and the safety of police officers. This special recognition to the heightened need for deference to the employment decisions of those responsible for ensuring public safety has been well-articulated by the Eighth Circuit:

> It has been recognized that a police department has a more significant interest than the typical government employer in regulating the speech activities of its employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence. Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer. The public safety employer's determinations of both the potential for disruption as a result of the speech, as well as the employer's response to the actual or perceived disruption are entitled to considerable judicial deference.

Tyler v. City of Mountain Home, 72 F.3d 568, 570 (8th Cir. 1995); *see also Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999) ("speech that might not interfere with work in an environment less dependent on order, discipline, and esprit the corps could be debilitating to a police force"); *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995) (refusing to grant First Amendment protection to a police officer's speech at a city council meeting because the officer's criticisms of the department's policies threatened department morale and the chain of command); *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995) ("because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employment.")

Petitioner's reliance on *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) for the proposition that *actual* harm must be shown to the efficient operations of the employer is misplaced. Far from establishing any hard and fast rule against preemptive action prior to the disruption of government operations by an employee's speech, as Petitioner suggests, the Court merely held that government official's "predictions of disruption must be *reasonable*." *Id.* at 364. In the present case, the Fifth Circuit had considerable evidence before it to conclude that HPD's "prediction of harm" was reasonable.[7] Thus, the Fifth Circuit correctly applied

---

[7] Chief Hurtt's lack of confidence in Petitioner's ability to continue to effectively perform his duties as a patrol officer was shared by the Assistant Chief over Petitioner's patrol division, as well as by

the balancing test as required by *Pickering* and its progeny.

2. Law enforcement agencies have a substantial interest in maintaining the mission and professionalism of its officers.

Petitioner unconvincingly claims that any impairment his speech caused to HPD's relationship with the citizenry it serves is of no importance when considering the effectiveness and efficiency of the public services provided by HPD. Petitioner fails to recognize that such "external" harm, as he describes it, directly impairs the mission and proper performance of HPD's police functions. As noted by the Fifth Circuit in its opinion, "HPD often relies upon members of the public to provide critical information, to serve as witnesses, to respect law enforcement authority, and to provide financial support." (Pet. App. A, 13a). Petitioner's speech, and his magazine articles in particular, made patently offensive and caustic comments about certain segments of the population he was sworn to protect and serve. Given that Petitioner identified himself in the articles as an HPD police officer, and wrote from the perspective of an HPD "insider," it was reasonable for HPD to conclude that Petitioner's speech would negatively impact public confidence in HPD and generally bring the mission of HPD and the professionalism of its officers into serious

---

Petitioner's divisional commander, who testified that he was "unnerved" by some of Petitioner's statements, and agreed that Petitioner's comments about being comfortable violating lawful orders would not instill public confidence in HPD or its officers.

disrepute, thereby interfering with the efficient operations of HPD.[8]

Petitioner's reliance on *Flanagan v. Munger*, 890 F.2d 1557, 1566-67 (10th Cir. 1989) and *Berger v. Battaglia*, 779 F.2d 992, 1000-01 (4th Cir. 1985), to the extent that they minimize the significance of community trust and respect on the efficiency and efficacy of police functions, is severely undermined by this Court's subsequent decision in *City of San Diego v. Roe*, 543 U.S. 77, 125 S.Ct. 521 (2004). In *Roe*, a police officer was terminated for selling pornographic videos of himself on eBay. In the videos, the officer appeared in uniform and performed a parody of an officer performing indecent acts in the course of official duties. *Id.* at 81. In holding that Roe's speech was not entitled to First Amendment protection, this Court had little difficulty in finding that Roe's activities, when known to the public, would be "detrimental to the mission and functions of the employer." *Id.* at 84; *see also Dibble v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) (holding that the City's interest in maintaining efficient operation of police department outweighed police officer's interest in maintaining sexually explicit website featuring himself and his wife because officer's activities were detrimental to mission

---

[8] Petitioner's article comparing inner-city minority residents drew the attention of another local publication, the *Houston Press*. The article in the *Houston Press* identifies Petitioner as a veteran HPD officer and describes Petitioner's article by stating, "It offers, as you might expect, an inside look at what HPD folks are thinking." It then specifically quotes from Petitioner's article and sarcastically concludes, "and the relationship between HPD and minorities takes another giant step forward."

and functions of department by undermining public respect and confidence); *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1356 (11th Cir. 2006) (noting that police officer's public sexual activities, once known, would interfere with the functions and mission of police department because it undermined public confidence in the department).

Finally, Petitioner's claim that he is being subjected to a "heckler's veto" is misplaced. As discussed by the Ninth Circuit in *Dibble*, judicial concern about a heckler's veto has generally involved restrictions to a citizen's speech based upon the expected disorderly reaction to the speech by members of an audience. *Dibble*, 515 F.3d at 928. "Those worries do not directly relate to the wholly separate area of *employee* activities that affect the public's view of a governmental agency in a negative fashion, and, thereby, affect the agency's mission." *Id.* at 928-29 (emphasis added). Petitioner's heckler's veto argument also ignores the unique public safety mission of a police department and its necessary daily interaction with the public. *Id.* Thus, the Fifth Circuit's consideration of the public's perception of Petitioner's speech when it weighed the potential for disruption to HPD's police functions was appropriate.

II. Petitioner Has Not Identified A Conflict In The Various Circuit Courts' Application of *Garcetti*.

In *Garcetti v. Ceballos*, this Court noted that employers have a "heightened interest in controlling speech made by an employee in his or her professional capacity" because supervisors have a need to "ensure that their employee's official communications are

accurate, demonstrate sound judgment, and promote the employer's mission." 547 U.S. 410, 126 S.Ct. 1951, 1960 (2006). Thus, this Court held that when public employees speak pursuant to their official duties, they are not speaking as citizens, and their speech is not afforded constitutional protection. *Garcetti,* 126 S.Ct. at 1960. In *Garcetti,* this Court did not articulate a comprehensive framework for defining what it means to speak "pursuant to official duties," but instead sought to encourage lower courts to view the facts of a given case from a "practical" perspective. *Id.* at 1961. Although various circuit courts have employed their own nuances and emphases when making this practical determination, any differences spring from the enormous variety of fact situations presented in such cases, and not from the use of different or inconsistent definitions of what constitutes speech "pursuant to official duties."

1. The Fifth Circuit's decision does not conflict with the other courts of appeal.

The Fifth Circuit has held that "activities undertaken in the course of performing one's job are activities pursuant to official duties" under *Garcetti. Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007). Furthermore, the fact that an employee's speech is not directly authorized or required by a person's job duties does not necessarily convert employee speech into protected citizen speech. *Id.* at 694. The relevant inquiry is whether the speech was made in the course of performing one's job duties. *Id.*

The Fifth Circuit's definition of what it means to speak "pursuant to official duties" is not in conflict with other circuit courts. *See Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (police officer's criticism of department's reorganization plan were considered remarks made "in her capacity as a public employee contributing to the formation and execution of official policy); *Green v. Board of County Commissioners*, 472 F.3d 794, 801 (10th Cir. 2007) (employee's communications with outside vendor, while not authorized or required by employee's job responsibilities, nevertheless stemmed from her job and were the types of communications that would be attributable to employer); *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (construing a university employee's report, which alleged improprieties in management of financial aide funds, as "pursuant to her official responsibilities"). Indeed, there is little, if any, distinction between the circuit courts in determining what constitutes speech "pursuant to official duties." When viewed as a whole, the circuit court cases distinguish between speech that is "'the kind of activity engaged in by citizens who do not work for the government' and activities undertaken in the course of performing one's job." *Williams*, 480 F.3d at 693 (quoting *Garcetti*, 126 S.Ct. at 1962).

In struggling to find a conflict where none exists, Petitioner incorrectly portrays the decisions in *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) and *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) as limiting *Garcetti's* scope and force to include only that speech that is expressly authorized or approved by the employee's supervisor. Contrary to Petitioner's assertions, both *Casey* and *Freitag*

acknowledge that the critical inquiry is whether the speech at issue was made "pursuant to official duties." *Casey*, 473 at 1329; *Freitag*, 468 at 545. Neither case, however, prohibits *Garcetti's* application to speech that is not authorized but is nevertheless undertaken in the course of performing one's job duties. Indeed, in *Casey*, certain communications the employee made that were directly contrary to her principal's instructions were nevertheless considered by the court as having been made pursuant to her official duties. *Casey*, 473 F.3d at 1331. Therefore, Petitioner has failed to identify that a true conflict exists among the various courts of appeal.

2. The Fifth Circuit correctly found that Petitioner's media interviews were made pursuant to his official duties.

In the present case, it is easy to conclude that Petitioner's media statements were made pursuant to his official duties and during the course of performing his job duties. Petitioner spoke with the media on January 18, 2006 *while on duty, in uniform, and while working at the scene of a police investigation*. Further, he made an attempt to gain supervisory approval to speak to the media prior to making his statements. Petitioner's January 19 statements to radio talk shows and television news programs were simply a continuation of his accident-scene statements the previous day, which were made in his role as an employee. On both days, Petitioner called the media relations department to let them know he spoke to the media. Why would Petitioner inform the HPD media office of his statements if he were speaking solely as a private citizen, rather than as an HPD employee?

Perhaps most significantly, Petitioner admitted in his Original Complaint that "on or about January 18, 2006 through January 19, 2006, Plaintiff, ***in the course of his official duties as a police officer with the Houston Police Department***, made public remarks regarding the lack of effectiveness in the policies and procedures of the Houston Police Department." (emphasis added). It is simply disingenuous for Petitioner to now proclaim that he was not acting in the course of performing his job duties.

Finally, it is relevant that Petitioner's media statements were circumscribed by his performance "expectations" and "professional responsibilities" as an HPD officer. *Garcetti*, 126 S.Ct. at 1960-62. As an HPD officer, Petitioner's "professional responsibilities" indisputably included the following:

- A duty not to commit any act that tends to bring reproach, discredit, or embarrassment to the department;

- A duty to be courteous, civil, and respectful to superiors, subordinate employees, coworkers, and citizens;

- A duty not to make false, untrue, or misleading statements, verbal or written;

- A duty to refrain from making public statements about departmental policies or initiatives, or statements that could be construed as representing the department's official policy or position, without first obtaining permission from the chief of police;

- A duty to refrain from criticizing or ridiculing the department or its policies in a manner that is defamatory, obscene, or unlawful, or that undermines the effectiveness of the department, interferes with the maintenance of discipline, or recklessly disregards truth or falsity; and

- A duty not to engage in any form of speech likely to be construed as racial or religious slur or joke.

Petitioner's media statements were governed by these official policies, and as an HPD officer, Petitioner was expected to adhere to such policies as part of his "professional responsibilities." *See Garcetti,* 126 S.Ct. at 1960.

3. Granting the Petition would serve no practical purpose, since the *Pickering* balancing tests provides a separate and independent basis for dismissal of Petitioner's lawsuit.

Even where a clear conflict exists among the circuits, certiorari may be denied where resolution of the conflict would be irrelevant to the ultimate outcome of the case. Here, the Fifth Circuit found that even if Petitioner's media statements constitute citizen speech, rather than employee speech, Petitioner's statements would not be afforded First Amendment protection under *Pickering*. Thus, this case would present a poor vehicle for resolving any existing conflict regarding the lower courts' application of *Garcetti*.

CONCLUSION

For the above reasons, the Court should deny Petitioner's Petition for Writ Certiorari.

Respectfully submitted,
FELDMAN, ROGERS, MORRIS
& GROVER, LLP

DAVID M. FELDMAN
Counsel of Record
5718 Westheimer, Suite 1200
Houston, Texas 77057
Telephone: (713) 960-6000
Facsimile: (713) 960-6025

ATTORNEY FOR RESPONDENTS
CITY OF HOUSTON AND HAROLD
HURTT